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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 52.

IDA A. VAN DYKE AND CLEVE W. VAN DYKE, *Appellants*,

vs.

W. PAUL GEARY, AMOS W. COLE AND FRANK A. JONES, MEMBERS OF THE CORPORATION COMMISSION OF THE STATE OF ARIZONA, ET AL.

BRIEF OF APPELLEES.

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BRIEF OF APPELLEES

STATEMENT

On the 14th day of February, 1912, Arizona was admitted as a state and its constitution, which took effect on that date, provided a basic law covering corporations and by Article XV created the Corporation Commission. After the admission of Arizona as a state, the Corporation Commission made an order, regulating the rates charged for water in the town of Miami by the appellants in this case. Appellants claim that

the Corporation Commission had no power to regulate rates charged by them in this case, they being individuals and not a corporation. Appellants went into the United States District Court for relief and that court having decided the matter adversely to appellants, they now appeal to this court. The Attorney General of the State of Arizona is now and has been the attorney for appellees from the commencement of this suit before the Corporation Commission.

The Attorney General filed a brief in this case in the United States District Court in and for the district of Arizona, and the argument which we present in this brief, is substantially the argument presented by the Attorney General in the District Court below.

Ida A. Van Dyke, one of the appellants herein, has been, since the 28th day of November, 1911, owner of a certain water plant and water system, located in the town of Miami, state of Arizona, and has been since said date, and is now engaged in the distribution and sale for profit, of water to the inhabitants of said town for domestic, commercial and fire purposes. On the 17th day of October, 1913, the Corporation Commission of the State of Arizona instituted an investigation to determine the reasonableness of rates charged by sad Ida A. Van Dyke to the inhabitants of said town of Miami for water and filed a complaint against the said Ida A. Van Dyke and Cleve W. Van Dyke, also one of the appellants herein. The appellants, in answering the said

complaint of the Corporation Commission, objected to the jurisdiction of the Corporation Commission, upon the grounds and for the reason stated by them, that under the constitution and laws of the state of Arizona, the Corporation Commission had no right to regulate a public utility owned by an individual. This seems to be the fundamental though not the only question presented by appellants in this case. Appellants filed a plea in bar before the Corporation Commission which said plea was overruled by the Corporation Commission on the 10th day of November, 1913. The Corporation Commission then directed its expert engineer and expert accountant to examine the properties owned by the said Ida A. Van Dyke and to make a report on the physical valuation of said properties and of the income and operating expense thereof. Subsequent thereto, on the 11th and 12th days of December, 1913, a hearing was had by the Arizona Corporation Commission at the town of Miami for the purpose of taking testimony as to the valuation of the water plant and system owned by appellants, and for determining the reasonableness of the rates charged by the appellants for water. At said hearing, an extensive report was filed by the engineer and accountant of the Corporation Commission, which report was the result of several weeks extensive investigation into the valuation of said water plant and system at Miami, so owned by appellants.

At said hearing appellants, though represented

by counsel, depending upon their contention that the Corporation Commission had no jurisdiction to regulate said utility, refused and declined to submit any testimony whatsoever regarding the constituent units of said water plant and system, or the valuation of any part thereof. No testimony was offered by the appellants as to the value of any real estate holdings owned by them, or the character of the same, or as to the value or the character of any part of said plant and system, and no testimony was offered or suggestion made by appellants at said hearing as to the existance or value of any water rights owned by them. These facts appear by the affidavits of Engineer Ferguson, Accountant Sangster and W. P. Geary, then chairman of the Corporation Commission.

At said hearing it developed that water obtained by appellants for the purpose of distribution is pumped from wells located in a gulch, situated between two lines of foothills, near the town of Miami. These wells do not touch any underground stream, but the water in them is only seepage from the foothills and mountains. It also developed that appellants had taken up some of the land around these foothills by means of mining locations, but it did not appear at said hearing that these lands were held for other than speculative mining purposes. No storage of water in any form is maintained by appellants in the operation of their water plant and system. No testimony was offered by appellants herein as

to the value of any of said real estate holdings or as to the value and nature of any part of the water plant and system, they refusing at said hearing to present any testimony upon the alleged grounds that the Commission had no jurisdiction to regulate the utility owned by appellants.

On the 1st day of May, 1914, subsequent to said hearing, the Corporation Commission entered its opinion and order regulating rates to be charged by appellants. In said order the Commission placed a value upon the water plant and system owned by appellants, determining the value to be the present value or a reproduction value new, depreciated. The Commission allowed to appellants the value of ten acres of land, upon which the wells of the water plant and system owned by appellants are located, which was considered sufficient real estate holdings to cover said wells and real estate holdings enough to prevent contamination of said wells. The Commission disallowed any valuation for any other real estate upon which the water pipes and system of appellants are located. The Commission allowed for all the physical units of the water plant and system upon the theory hereinbefore mentioned, including in the value of said physical units the cost of material, the cost of installation and in said units cost, general contractor's profits and other items of construction. To these items it added a percentage of 14 per cent to cover the overhead charges not included in the unit price. The Commission further made an allowance for a going

value, also an adequate allowance for working capacity and by these results obtained the present value for rate making purposes of the water plant and system owned by appellants of $40,105.00. From the report of the accountant of the Commission, a correct analysis of the operating expenses and income derived by appellants from the operation of said water plant, was determined which was at the time of the hearing 45 per cent on the valuation of said plant as found by the Commission. In addition to the operating expenses, the Commission added 3 and 1-2 per cent for a depreciation and reserve fund in addition to that, a 10 per cent rate of return upon the valuation of the property of the water plant and system owned by appellants' and reduced the rates charged by appellants to consumers for water in the town of Miami.

Appellants applied to the District Court of the United States in and for the District of Arizona for injunctive relief upon the following grounds, to-wit:

1. That, under the Constitution and laws of the State of Arizona, the Corporation Commission has no jurisdiction to regulate a utility owned by an *individual* and not owned by an *incorporation*.

2. That the order of the Commission was confiscatory and deprived appellants of their property without due process of law and that the penalties for the enforcement of the order of the Commission amount to confiscation of the prop-

erty of the appellants, for the reason that they claim certain valuations were not allowed by the Commission, in estimating the value of the water plant and system, that should have been allowed, and that, therefore, appellants are not earning an adequate return upon the value of their property and, for said reason, the rates fixed by the Commission, in its opinion and order, are confiscatory.

The United States District Court, on the 11th day of August, 1914, entered its decree and order in this case, from which appellants appealed, alleging five assignments of error.

ARGUMENT UPON THE QUESTION AS TO WHETHER OR NOT THE CORPORATION COMMISSION HAS THE RIGHT TO REGULATE PUBLIC UTILITIES OWNED BY AN INDIVIDUAL

Has the Corporation Commission of the State of Arizona power to prescribe just and reasonable rates and charges to be made and collected by public utilities in the State of Arizona where said public utility is owned by an individual, as well as one owned by an incorporation, in view of Article XV of the Constitution of the State of Arizona and Chapter XI, Title 9 of the Revised Statutes of the State of Arizona, 1913?

This question may be subdivided as follows:

1. May the Corporation Commission of the State of Arizona determine just and reasonable rates to be collected by a public utility owned by an individual under the present laws and Constitution of the State of Arizona, irrespective of further legislative enactment?

2. Is Chapter XI, Title 9 of the Revised Statutes of Arizona, 1913, an enactment which is constitutional in so far as it directly gives the Corporation Commission power to fix just and reasonable rates to be collected by a public utility owned by an individual?

A proper construction and interpretation of Article XV of the Constitution of the State of Arizona gives to the Corporation Commission of the State the power to fix the rates and charges to be collected by a public utility owned and operated by an individual.

The principal sections of said Article XV of the Constitution of the State, applicable to this question are as follows:

> "Article XV. Sec. 2. All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public tele-

graph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations."

"Article XV. Sec. 3. The Corporation Commission shall have power to and shall prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected by public service corporations within the State for services rendered therein."

The determination of the point raised by appellants depends upon the construction and interpretation to be placed upon the words "corporation" and "public service corporation" as used in said Article XV. Are they to be construed in the limited sense, as meaning only incorporated companies, or in a larger sense, as including incorporated association and persons and individuals? Appellants claim that Section 1 of Article XIV of the Constitution is determinative of this question. Said section reads as follows:

"Article XIV. Sec. 1. The term 'corporation,' *as used in this Article*, shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or co-partnerships, and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases at natural persons." (Italics are ours.)

Article XIV of the Constitution is entitled

and refers to "Corporations Other Than Municipal" and has no reference to, or connection with, Article XV of the Constitution, entitled and referring to "The Corporation Commission." The framers of the Constitution expressly limited the definition of the word "corporation" contained in Section 1 of Article XIV to said Article, as is evidenced by the use of the words "as used in this Article." If they had intended said definition to apply to the word as used through the Constitution they would have said so, and the fact that they limited the definition of said word to that particular article must be taken as evidence of their intention not to have the same definition apply to the word "corporation" as it appears in the succeeding article, i. e., Article XV. We, therefore, contend and insist that the definition of "corporation" as used in Article XIV, throws no light upon, nor can be considered in the construction and interpretation of the word "corporation" as used in Article XV of the Constitution, or as used in Chapter XI, Title 9, Revised Statutes of Arizona, 1913. As was said by the Supreme Court of Kentucky, in the case of *Commonwealth vs. Adams Express Company*, 123 *Ky.* 720 (97 *S. W.* 386), a constitutional provision that the word "corporation," as used "in the constitution" shall embrace stock companies and associations, does not control the definition of the word "corporation" when used in the statutes of the State. How much more forcible is this rule when the definition of the word is lim-

ited, as it is in our Constitution, to one particular Article.

We are, therefore, compelled to determine the purpose and intention of the framers of the Constitution by the use of the word "corporation" in Article XV without reference to the construction of that word as used in Article XIV of the Constitution.

To determine what definition, construction and interpretation should be placed upon the words "corporation" and "public service corporation," as used in said Article XV of the Constitution, we should be governed by the following elementary principles of constitutional and statutory construction:

(A) *That in such construction and interpretation the reason or spirit of the law will prevail over its letter.*

Hicks vs. Krigbaum (*Ariz.*) (108 *Pac.* 482).

Liebes vs. Steffy, 4 *Ariz.* 11 (32 *Pac.* 261).

36 *Cyc.* 1108.
Commonwealth vs. Adams Express Co., supra.

Parker vs. Nothomb, 60 *L. R. A.* 699.
Territory vs. Clark, 2 *Okla.* 82 (35 *Pac* 882).

James vs. United States Fidelity & Guaranty Co., 117 *S. W.* 406.

United States vs. Kirby, 74 *U. S.* 482.
Ex Parte Mills Sing, 112 *Pac.* 582.

As was said by the Supreme Court of California in the latter case:

> " 'The doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the Legislature, and does not warrant a court in confining the operation of a statute within narrower limits than was intended by the law makers.' Black on Interpretation of Laws, p. 143. To give the narrow construction claimed by petitioner would be to say that the Legislature intended to confer a benefit by protecting one class of dependents with whom some one was standing in *loco parentis*, while at the same time those dependents with whom no one stood in such relation should be unprotected. To give the words 'any other person' a broader and more comprehensive interpretation, by saying that it was intended to include all persons committing the acts specified, would make the act applicable to all who are so unfortunate as to be included in the term 'dependent.' "

See, also, Wood vs. Independent School District No. 2, 124 Pac. 780; Pickett vs. United States, 54 L. Ed. 566; Cummings vs. Pence, 91 N. E. 529.

(B) *Every constitutional provision or statute must be construed with reference to the object intended to be accomplished by it.*

If we apply this principle of construction to Article XV of the Constitution, we must say that

by the use of the words "corporation" and "public service corporation" the framers of the Constitution intended to make the provisions of said Article applicable to every individual or association of persons operating a public utility, whether incorporated or not, and the interpretation of said words may be so extended. The object and purpose of Article XV of the Constitution are obvious. It was the plain and apparent intention of the framers of the Constitution to provide for an administrative commission with legislative and judicial powers to regulate public utilities in the State of Arizona and see that equitable and just relations should be maintained between them and their patrons. It was clearly their intention and purpose to provide for a commission which should so regulate the rate and charges to be made and collected for the use of gas, water or electricity when sold to the public, that a fair profit might me enjoyed by the utility selling and disposing of those commodities and yet the public be charged only reasonable rates. The obvious purpose of Article XV of the Constitution was to regulate the sale and business of selling gas, water and electricity and not, particularly, to regulate the owners of the plant which manufactured or distributed said commodities. To construe the words "corporation" and "public service corporation," as used in said Article XV, to mean only incorporated associations and companies would be to defeat the very purpose of the act and lead to an absurd and unjust conclusion and

result. Can it be conceived that, the framers of the Constitution intended that, if two water plants were situated in the same town, one owned by an incorporated company and the other by an individual, both disposing of and selling water to the same community, that, one was subject to regulation by the Corporation Commission as to its rates and the other was not, merely because one might be owned by an incorporated company and the other by an individual.

Most public utilities are owned by incorporated companies but, by the use of the words "corporation" and "public service corporation," it is clear that the framers of the Constitution intended to extend the general meaning of said words to include every owner of a public utility. This is not a new question and has been constantly determined by the courts adversely to the contention of appellants. Montana has a statute which renders *railroad corporations* liable for injuries caused by the negligence of engineers. The act, by its terms is made applicable to *railroad corporations* alone. The Northern Pacific Railroad Company questioned the constitutionality of the act, upon the grounds that, as corporations were only specified by its provisions, it did not afford equal protection of the law. In the case of *Lewis vs. Northern Pacific Railroad Company*, 36 *Mont.* 207, 92 *Pac.* 469, the Supreme Court of Montana, passing upon this point, said:

"Our own statute is susceptible of the

> construction given to the statutes of Iowa, Indiana and Colorado by the courts of those states. The general purpose of it is, as indicated by its title and the character of the provisions embodied in it, to secure the safety of employes, and thus, indirectly of the public. Assuming that the expression 'railway corporation' is used in a general sense, the design being to include all persons engaged in operating railways, it would be free from all objection. And this might be done under the rule of construction that, having ascertained the general purpose, of a statute, to give effect to this general purpose, general words may be restricted to a particular meaning, or those of a restricted meaning may be expanded so as to embrace the general purpose and effectuate it. 2 *Lewis' Sutherland Statutory Construction* 347."

The court held in this case that the word "corporation" should be construed and interpreted to include individuals.

Indiana has a statute which provides that every railroad or other corporation operating in the state shall be liable for injuries suffered by its employees under certain circumstances. The law was contested by the railroad companies upon the same grounds raised in the Montana case, i. e., that it discriminated against a corporation owning a railroad and in favor of an individual owning a railroad. In passing on this point, the Supreme Court of Indiana, in the case of *Pittsburgh C. C. & St. L. Ry. Co. vs. Lightheiser*, reported

in the *78th N. E.* 1033, said, on reading page 1041:

> "Appellant contends, however, that the statute in question violates said constitutional provision, because it only applies to corporations operating railroads, and not to persons engaged in operating railroads. Substantially the same objection was made in the case of *Pittsburgh, etc., Ry. Co. v. Montgomery, supra*, and this court, in that case, citing *Bucklew v. Iowa Central Ry. Co.*, 64 *Iowa* 611, 21 *N. W.* 103, and other cases above cited, held the law valid."

And again the court said, on reading page 1042:

> "True, the employers' liability act of this state provides that "every railroad or other corporation, except municipal, operating in this state shall be liable for damages for personal injuries suffered by any employe," etc. But, in *2 Lewis' Sutherland on Statutory Construction, Paragraph 347*, it is said to be indispensable to a correct understanding of a statute to inquire, first, what is the subject of it—what object it is intended to be accomplished by it. When the subject matter is once clearly ascertained, and its general intent, a key is found to its intricacies. General words may be restrained to it, and those of narrower import may be expanded to embrace it, to effectuate that intent. When that intention can be collected from the statute, words may be modified, altered, or supplied, so as to obviate any repugnancy or inconsistency with such inten-

tion. The subject matter of the statute in question here, and its intent and purpose so far as applicable to railroads, were to protect employes from the peculiar dangers and hazards in railroading. Union, etc., Ry. Co. v. Houlihan, and cases cited supra. Under the decisions cited the character of the employers is not a controlling factor. The statute is to be given at least a reasonable interpretation. One that will carry into effect the legislative intent. As we have shown, the basis of the classification of railroads by themselves was the hazardous and dangerous character of the employment of operating railroads, and this does not depend upon whether railroads are operated by corporations or by one or more persons.

If the character of the employer within the meaning of the statute is not importnat —and the nature of the employment is the test to be appealed in construing—the expression "every railroad or other corporation operating within this state", as applied to railroads, should, under the rule above stated be enlarged and expanded so as to include any person, company, or corporation engaged in operating a railroad in this state."

And again, on reading page 1043:

"The spirit and purpose of the statute must be looked to in interpreting the statute in controversy. As we have seen, the spirit and purpose of the employers' liability act of this state, so far as railroads are concerned, was the protection of employes engaged in the dangerous and hazardous work of operating railroads in this state, and we

> hold that it applies to every corporation, company, co-partnership, or person engaged in the dangerous and hazardous business of operating a railroad, and their employes who are engaged in such dangerous and hazardous work."

The State of Colorado has a law which provides, "That every *railroad corporation* operating its line of road in the state shall be liable for all damages by fire that are caused by operatng said road." The same objection was raised to this law as to the Montana and Indiana law and in determining such point the Supreme Court of Colorado said, in the case of *Union Pacific Railroad Company vs. De Busk*, reported in the *20th Pac. 752 (12 Colo. 204), on reading pages 756* and *757* of the Pacific Reporter, as follows:

> "But no discrimination was either expressed or intended in favor of private individuals, or against railroad corporations, by our statute making them liable for damages by fire caused by the operation of their trains. The object of the statute was to give an adequate remedy to those who should suffer damages from fire caused by the operation of locomotive engines by the dangerous agency of steam. The object of the act was not to punish railroad corporations, but was to declare upon whom the loss must fall in case damage by fire should ensue by the operation of railroads. In the act under consideration the legislature evidently used the words 'railroad corporaton in their popular sense, as denoting any party engaged in the operation of railroads. It was a matter

of common knowledge then, as it has been ever since, and is now, that railroads were operated only through the agency of corporations. Hence, there was in fact no chance for discrimination—no chance to deprive any one of 'the equal protection of the laws'—by declarng a liability against 'railroad corporations' only, since they only were thus engaged in operating railroads.

We have seen that the word 'persons' was held to be comprehensive enough to include corporations, and thus the constitution of California was declared to be in conflict with the Constitution of the Unted States. In passing upon the constitutionality of this act of our territorial legislature, we think the words 'railroad corporations' should be construed to mean any body, company, or association of persons, whether technically incorporated or not, engaged in the operation of railroads. We feel bound to go thus far in construing the language of the act—*First*, for the reason that such was obviously the meaning intended by the legislature: and, *second*, to avoid the necessity of declaring the act unconstitutional. Whenever a word or phrase of an act is used in more senses than one, that sense is always to be preferred which will sustain and give effect to the act, rather than the sense which would render that act unconstitutional and void."

A similar law existed in Iowa and, in the case of *Bucklew vs. Central Iowa Railway Company*, 64 *Iowa* 603 (21 *N. W.* 103), *the court held that* the term "corporation" in the statute should be extended in its meaning to include individuals.

In the case of the *Missouri Pacific Company vs. Mackey*, 127 *U. S.* 205 (32 *L. Ed.* 107), the Supreme Court of the United States held that the word "corporation," as used in the statute should be construed to be comprehensive enough to include the words "person or individual" and, in the case of *Schus vs. Power Sampson Co.*, 85 *Minn.* 447 (89 *N. W.* 68), the Supreme Court of Minnesota held, as the other states, that the expression "railroad corporation" was intended to mean and apply to any railroad, whether owned by a corporation or natural person. It seems to us that the reasoning of the various courts in these cases is applicable to the question raised by appellants here and are conclusive and determinative thereof.

(C) *Statutes should be interpreted according to the intent and meaning of the Legislature; and when words or phrases, if taken literally, would be inconsistent and repugnant, they should receive a liberal interpretation, considering the cause and necessity of the statute, and be made to harmonize, repugnancy avoided and inconsistency reconciled.*

> *New Lamp Chimney Co. vs. Ansonia Brass & Copper Co.*, 91 *U. S.* 656 (23 *L. Ed.* 336).
>
> *Upshur vs. Baltimore*, 94 *Md.* 757; 51 *Atl.* 953.

(D) *When a statutory provision admits of more than one construction that one will be*

adopted which best serves to carry out the purpose of the act.

Bernier vs. Bernier, 147 U. S. 242 (37 L. Ed. 152).

(E) *The courts should avoid a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience, if another and more reasonable interpretation is present in the statute.*

Bird vs. United States, 187 U. S. 118 (47 L. Ed. 100).

(F) *The intention of the Legislature, clearly expressed in a constitutional enactment, should not be defeated by too rigid adherence to the letter of the statute, or by technical rules of construction. Any construction should be disregarded which leads to absurd consequences.*

Oates vs. First National Bank, 100 U. S. 239 (25 L. Ed. 580).

Church of Holy Trinity vs. United States, 143 U. S. 462 (36 L. Ed. 226).

United States vs. Freeman, 3 Howard U. S. 556 (11 L. Ed. 724).

(G) *The meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being, that to extend the meaning in any case, it must be shown to come within the*

same reason upon which the law makers proceeded, and not merely a like reason.

United States vs. Freeman, supra.

Legislative construction of the constitutional provison was placed upon the words "corporaton" and "public service corporation," as used in Article XV of said Constitution, by the First Legislature of the State of Arizona by Chapter 90 of the Laws of the First State Legislature, as reincorporated in sub-divisions X and Z of paragraph 2278, Revised Statutes of Arizona, 1913, which sub-divisions read as follows:

> Subdivision X: "The term 'water corporation,' when used in this chapter, includes every corporation, or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system for compensation within this state."
>
> Sub-division Z: "The term 'public service corporation,' when used in this chapter, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, and warehouseman, as these terms are defined in this section and each thereof is hereby declared to be a public service corporation and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of this chapter."

Such legislative construction is entitled to great weight and consideration.

Missouri, O. & G. Ry. vs. State, 119 *Pac.* 117.

Genessee Chief vs. Fitzhugh, 12 *Howard U. S.* 443 (13 *L. Ed.* 1058).

Bors vs. Preston, 111 *U. S.* 252 (28 *L. Ed.* 419).

R. R. Com. of State vs. Market St. Ry. Co., 64 *Pac.* 1065 (132 *Cal.* 677)

City of Denver vs. Adams County, 77 *Pac* 858 (26 *Colo.* 338).

Coyle vs. Smith, 113 *Pac.* 944 (*Judgment affirmed in* 221 *U. S.* 599, 55 *L. Ed.* 853.)

Cooper Mfg. Co. vs. Ferguson, 113 *U. S.* 727 (28 *L. Ed.* 1137).

State vs. Tingey, 67 *Pac.* 33 (24 *Utah* 225).

Is Chapter XI, Title 9, Revised Statutes of Arizona, 1913, in so far as it gives the Corporation Commission power to regulate and fix charges to be collected by public utilities owned by an individual, constitutional?

Even if it were held that the Constitution, itself, does not give the Corporation Commission power to fix charges and rates to be collected by public utilities owned by an individual, it must be conceded that the Legislature can do so. Section 6 of Artcle XV of the State Constitution reads as follows:

> "The law-making power may enlarge the powers and extend the duties of the Corporation Commission, and may prescribe

rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provided by law, the Commission may make rules and regulations to govern such proceedings."

TITLE TO BILL PASSED BY LEGISLATURE IS SUFFICIENT

It must be conceded that the Legislature, in Chapter XI, Title 9 of the Revised Statutes of Arizona, 1913, has given the Corporation Commission power to fix charges and rates to be collected by public utilities owned by individuals. Appellants, however, claim that Sub-divisions X and Z of paragraph 2278 of said chapter and title, Revised Statutes of Arizona, 1913, granting such powers, embody a subject not contained in the title of the law, which is as follows:

"An Act Relating to Public Service Corporations, Providing for the Regulaton of the Same, Fixing Penalties for a Violation Thereof and Repealing Certain Acts, with an Emergency Clause." (*Chap. 90, Session Laws of Arizona, Regular Session* 1912, *p.* 405).

We see no merit in this contention. The title of the act covers the general subject of the regulation of public service corporations and everything included therein or germane thereto. Sub-divisions X and Z of said paragraph 2278 of the Revised Statutes, 1913, define the meaning to be given to the words "public service corporation," as used in the act, including the mean-

ing of the words as used in the title. This the Legislature had a perfect right to do. The Legislature may define certain words used in the statute, or declare, in the body of the act, the construction to be placed thereon, and the courts are bound by such construction, although otherwise the language would have been construed to mean a different thing. 36 *Cyc.* 1105, 1106.

Snyder vs. Compton, 87 *Texas* 374 (28 *S. W.* 1061.)

Central Kentucky Traction Co. vs. Coombs, 136 *W.* 1045.

Piper vs. Boston M. R. R. Co., 75 *Atl.* 1041.

State vs. American Surety Co., 135 *N. W.* 365.

State vs. Standard Oil Co., 123 *Pac.* 40. *State vs. Harrison*, 116 *Ind.* 300 (19 *N. E.* 146.)

Chicago & E. I. Ry. Co. vs. State, 153 *Ind.* 134 (51 *N. E.* 924).

United States vs. Freeman, *supra.*

Alexander vs. Alexandria, 5 *Cranch* 1 (3 *L. Ed.* 19.)

A constitutional definition of the word "corporation," as used in a constitution does not control the definition of the word "corporation," as used in a statute and as defined by the Legislature.

Commonwealth vs. Adams Express Co., 123 *Ky.* 720; (97 *S. W.* 386).

If, as we have heretofore shown in this brief, the courts have held the word "corporation" to be construed in such a broad sense as to include "individual," where there was no statutory definition so extending its meanng, how much more should the meaning be extended to include "individual" in view of a statutory definition so extending such meaning.

The matters covered by sub-divisions X and Z of said paragraph 2278, Revised Statutes of Arizona, 1913, do not constitute a subject not embraced in the title of the act, but do constitute a definition of words used in the title and body of the act, namely, the words "public service corporations." Applying the rules and statutory construction heretofore cited by us in this brief, as applicable to the constitutional provision, to the statute, we contend that the court should hold that the staute is not objectionable in the particular claimed.

In concluding our argument upon this question, we earnestly contend:

1. That by the provisions of Article XV of the Constitution, the Corporation Commission is granted the power to fix proper rates and charges to be collected by a public utility owned by an individual, as well as one owned by a corporation.

2. That even if such power is not granted by the Constitution itself, it is legally and lawfully granted by a law which is constitutional, namely by said Chapter XI, Title 9 of the Revised Statutes of Arizona, 1913.

We rest our argument on this point, satisfied that such a construction will not be placed on the Constitution of the State of Arizona, or the Statutes referred to, as would practically destroy the effectiveness or usefulness of both and such a construction as would lead to an unjust discrimination as between a public utility owned by a corporation and a public utility owned by an individual.

FEDERAL QUESTION RAISED BY APPELLANTS.

The main Federal question raised by appellants is the contention that the order of the Corporation Commission complained of is confiscatory, in that it does not afford an adequate rate of return upon the property used and useful in the maintenance and operation of the utility owned by them. It is our contention that neither by the Bill of Complaint, or by the supporting affidavits filed in the court below were sufficient grounds in equity shown to justify the court granting appellants injunctive relief, as prayed for.

The Bill of Complaint filed in the court below did not state facts sufficient to justify the relief prayed for.

As we shall point out later in our brief, the presumption of law is that the order of the Corporation Commission is a valid one and that the rates fixed by it are compensatory and the burden of proof was upon appellants to overcome this

presumption. Such being the case, appellants must not only have proven but also must have alleged facts sufficient to overcome this presumption. Especially is this true in considering a motion where the Bill of Complaint is considered evidence in determining said motion.

> "In equity a party cannot succeed upon a case proved but not alleged any more than upon a case alleged but not proved." *Foster vs. Goddard*, 1 *Black* 506, 17 *L. Ed.* 228; *Grosholz vs. Newman*, 2 *Wall.* 481, 22 *L. Ed.* 471.

It is an elementary principle that a bill of equity must contain more than allegations, which are merely inferences or conclusions of law. Such ultimate facts must be set forth in the Bill of Complaint as will clearly show that the order complained of is confiscatory.

The allegations setting up the claim that the order of the Commission complained of is confiscatory will be found in paragraph 5 of compalinants' bill of complaint. We contend seriously that they are totally insufficient to have justified the court below granting injunctive relief as prayed for and that said paragraph contains mere inferences and conclusions of law in this.

1. The Bill of Complaint failed to show what was the value of appellants' property upon which the rate of return should be based.

2. The Bill of Complaint failed to show what were the operating expenses incurred in operating the utility owned by appellants.

3. The Bill of Complaint failed to show what was the net income, or what would be the rate of return under the old rates charged and what would be the rate of return under the new rates if the order of the Commission became effective.

4. The Bill of Complaint did not attack the order of the Commission upon the ground of confiscation, except in the following particulars, i.e., the alleged neglect of the Commission to include in the value of the utility the value of 240 acres of land, one well, one pumping plant and one spur track, and yet the Bill of Complaint failed to allege:

(a) That said land was owned by appellants or that said land was necessarily used or useful for the purpose of maintaining or operating said utility, or the value of said land for water purposes.

(b) The Bill of Complaint failed to allege that the well omitted belonged to appellants, or that it was necessarily used or useful in the maintenance and operation of the utility.

(c) The Bill of Complaint failed to allege that the water right, for which a value was claimed, was the property of appellants, or that it was necessarily used or useful for the maintenance and operation of the utility.

(d) The same objection appiles to the allegation relative to the pumping plant and spur.

A Bill of Complaint much more comprehensive than the one in the case at bar was held insuffi-

cient in a late case decided by the Supreme Court of the United States. *See Southern Pacific vs. Campbell, 230 U. S. 537 (57 L. Ed. 1610).*

For these reasons the application of appellants for injunctive relief was properly denied.

ARGUMENT OF FACTS.

It appears from the affidavits of William Sangster, W. P. Geary, Chairman of the Corporation Commission, and G. P. Bullard, Attorney General, that at the hearing had before the Commission, appelants refused to introduce or produce any evidence or information showing any part of the value of their plant, or showing that the so-called water shed was property used or useful for the purposes of the water plant, or for what reason a value should be allowed therefor. No mention was made at said hearing of any water right owned by appellants or the value thereof, or in what manner or what purpose any water right was property used or useful in the operation and maintenance of said water utility. To say that after having sat silent at said hearing and then be allowed to go into court and ask for injunctive relief against the order of the Commission would be to stretch the rule of equity and would result in inequity instead of equity. *"Equity aids the vigilant and not those who slumber upon their rights." He who comes into equity must come with clean hands."*

Where it was shown that appellants, at the

hearing before the Commission, failed to offer evidence as to values, afterwards claimed by them, and refused to offer any evidence at all, we say that they were not vigilant and did slumber upon their rights and they do not come into equity with clean hands.

VALUATION OF LAND CLAIMED BY COMPLAINANTS.

Miami is a mining town, situated in the mountains in Gila County, Arizona, with a population of 3,000 to 5,000 souls. The water system of appellants is situated in a gulch or wash near the townsite of Miami and running by the side of said gulch or wash are some small foothills, and extending beyond the foothills are the Pinal Mountains, which are barren and not susceptible of irrigation, but contain some mineral and are useful for no purpose other than mining or for maintaining goat or chicken ranches, or for townsite purposes. Further description of these foothills, and the topography of the country surrounding the gulch or wash upon which the water system of complainants is situated, will be found in the affidivait of Expert Ferguson.

The so-called water shed, for which a valuation is claimed by appellants, consists of a number of barren foothills approximating 240 acres, owned by appellants through mining locations and the acquisition of patented mining claims. The water supply of appellants is derived solely

from wells and not from springs or streams and no water is stored by them. No testimony was offered at the bearing before the Commission by appellants of the value of the so-called water shed. One witness before the Commission, H. M. Brown, a real estate agent, stated that $50.00 per acre would be a liberal appraisement of the market value for all purposes of the lands contained in appellants so-called water shed. J. J. Mackey, a real estate owner and experienced in the value of real estate in Miami, himself the owner of a water plant, testified before the Commission that the washes and draws in the foothills composing the so-called water shed of appellants was worth about $75.00 per acre for water purposes, and that the remainder of said foothills are of practically no value for water shed or other water purposes. It did not appear from the evidence before the Commission the extent of the acreage of said draws and washes of said foothills owned by appellant. Mr. Mackey estimated that the acreage in the Van Dyke holdings, useful for water purposes, did not exceed forty acres. (See affidavit of George P. Bullard).

Allowances in value have been made by courts and commissions to water companies, where the water was stored and the water storage fed by streams and springs, for lands held for water shed purposes, but we cannot recall a single case where such an allowance has been made where the water distributed by the water utility was obtained solely by pumping from wells. In the

case of the plant owned by appellants the water would reach the wells of appellants just the same whether the foothills were owned by appellants or not. In fact, the evidence before the Commission showed that right in the center of appellants' so-called water shed is a large tract of land owned by Mr. Mackey, who was operating a water plant of his own. (See affidavits of W. P. Geary and Expert Ferguson). The original source of the water which eventually found its way to appellants' wells was in the Pinal Mountains and springs located upon lands not owned by the Van Dykes. The Pinal Mountains are not owned by appellants or any other person. To say that because some of the water which percolates into the wells of appellants runs down or seeps through the gullies and washes into the ground of the foothills owned by appellants, the consumers of appellants should have to pay a rate of return upon the value of said foothills would be to argue an absurdity. That the foothills were not purchased to prevent contamination of the wells clearly appears from the affidavits of Geary and Ferguson. An allowance was made to appellants of the value of ten acres of land for uses necessary and useful to the maintenance of the plant. (See affidavits of Geary and Expert Ferguson).

It appears from the affidavit of Geary, on file herein, that the water furnished to the City of Phoenix, Arizona, containing approximately 25,000 souls, is pumped from wells and yet all the land owned by the City of Phoenix, used and

useful for the purpose of its water supply, is not to exceed four acres. It would be just as reasonable to say that the City of Phoenix would have to acquire and own all the surrounding country and the hills surrounding the Salt River Valley to protect its water supply as to say that the ownership of these foothills is necessary in the operation of the plant of appellants. Said foothills were acquired by appellants for mineral, townsite and other speculative purposes and should not be included in the valuation of appellants' utility for rate making purposes. Appellants' claim, as the value of these barren foothills, the ridiculous amount of $160.00 per acre. Even where it has been recognized that a value should be allowed to the water utility for land held for water shed purposes, it has been held that the value of said land for rate making purposes is not its market value, but its value only for water purposes.

It was said in the case of *Spring Valley Water Company vs. City of San Francisco*, reported in 102*nd Fed.* 137, reading page 158:

> "The value of property is the value of its uses. If but half complainant's land is used, a return on that half only should be exacted. The value of that half would be the reasonable value of the property in use. If complainant's land is susceptible of two equally advantageous uses, each of which may be exercised without detriment to the other, and only one of them is taken for the public, half the value of the property again would be the reasonable value of the

> property in use. When watershed lands are used for grain raising, under proper resctrictions, neither use materially interferes with the other. So, also, lands may be employed at the same time both for water production and water storage. Neither use excludes the other."

Then, again, on reading page 160:

> "I cannot recede from the position taken in the 1908 case: If the company voluntarily devotes to the mere catchment of water lands which are much more valuable for other purposes, it is unreasonable, in fixing rates ,to appraise such lands for more than they are worth as watershed areas. *Spring Valley Water Co. v. San Francisco* (C. C.), 165 *Fed.* 667, 698."

The Commission considered that there was not sufficient testimony presented before it to show the necessity of the acquisition of these foothills by appellants for purposes used and useful for appellants' water plant, but even if it should be considered that the acquisition of said foothills, or the so-called water shed, was necessary for the operation and maintenance of appellants' utility, placing the value of the same at the value fixed by Mr. Brown as the market value, for all purposes, at $50.00 per acre for every foot of said water shed, would only result in an additional value of $12,000.00 to the valuation fixed upon appellants' water utility by the Commission and the net return, estimated by virtue of the new rates, as found by the Commission, to wit: $4,010.50, would result in nearly an eight per

cent rate of return on the value of the property of the utility, as found by the Commission, plus the entire value for all purposes of the entire so-called water shed of 240 acres, estimated at said $50.00 per acre. Such a rate could hardly be held, as a matter of law, to be confiscatory. We contend seriously that no valuation should be allowed to these fothills contained in the so-called water shed for the purpose of rate making, but, even if a proper valuation should be allowed for the same, the application of the net income to said valuation would not result upon a rate of return so low that a court could say that the property of appellants was confiscated.

THE WATER RIGHT VALUATION OF $20,000.00.

We can scarcely believe that appellants' will seriously contend for this valuation set forth in their bill of complaint, in view of the fact that no water is drawn from any running stream or spring to supply the water distributed by appellants' plant. We know no law in Arizona whereby a water right can be predicated upon the sinking of a well, especially where said well does not tap any subterranean stream. The water in appellants' wells is percolating water and not running water, and therefore not subject to appropriation. Certainly there was no evidence before the Commission, or before the court below, showing that any water right was owned by appellants which is necessarily used or useful for the

purpose of operating and maintaining the utility owned by them.

VALUE FOR WELL CLAIMED BY APPELLANTS IN THEIR BILL OF COMPLAINT $2,000 IN COURT BELOW.

The reason for the disallowance of this item is explained in the affidavits of Commissioner Geary and Expert Ferguson, on file herein. The well was not constructed at the time of the hearing and there is no evidence that it is constructed at this date. No permission, as is required by law, has been asked for, or obtained from the Corporation Commission to make this addition to the plant. If said well is necessary in the operation and maintenance of the water utility owned by appellants, the proper procedure, under the law, is for appellants to apply to the Commission to be allowed to construct the same and, if such permission is granted, the Commission will add the valuation thereof to the valuation of the utility and adjust the rates accordingly if an adjustment becomes necessary because of said added valuation.

VALUE OF MAIN PUMPING PLANT $3,000.00.

Mr. Ferguson explains in his affidavit the reason for the disallowance of this item. Appellants, in addition to owning a water utility in the Town of Miami, own, also, a telephone system and an

electric light plant. The electric light plant is used by appellant to furnish, distribute and sell electricity to the inhabitants of Miami. This value claimed by appellants, as explained by Mr. Ferguson in his affidavit, properly belongs to the electric utility which may be entitled to charge for the power furnished to the water utility for the purpose of pumping its water; but no part of said value of said electrical apparatus used to generate electricity for the electric light plant should be charged to the water utility for the purpose of rate-making.

VALUE OF SPUR TRACK.

An examination of the affidavit of Expert Ferguson shows that proper allowance was made for that portion of the value of the spur track which should be properly allocated to the water utility, the spur track being used for other purposes than for purposes used and useful for the water utility, and appellants are mistaken when they say that no account was made by the Commission for this valuation.

VALUATION PLACED UPON THE UTILITY BY THE COMMISSION WAS A FAIR AND LIBERAL ONE.

It will be observed by an examination of the affidavits of Commissioner Geary and of the affidavits of Expert Ferguson, and of the order of the Commission made as an exhibit and attached

to appellants' bill of complaint, that the Commission was extremely fair and liberal in fixing the valuation of the water utility owned by appellants.

In view of the prior decision of the U. S. District court, in the Pacific Gas & Electric Company case, they increased the percentage allowed for overhead charges from 12 per cent to 14 per cent; they also made an allowance for going value, though no evidence was offered by the utility of any such value. The Commission had extreme consideration for the views of the court, as expressed in the Pacific Gas & Electric Company case, and endeavored to carry out those views in their judgment, determination and opinion in the case at bar.

Appellants have no cause of complaint of the valuation fixed by the Corporation Commission on the property necessarily used and useful for the purposes of operating and maintaining the water utility owned by appellants and, as a matter of fact, they do not so complain, except in so far as they complain of the Commission's failing to make an allowance of value for the lands owned by appellants included in appellants' so-called water shed and in the other minor particulars hereinbefore set forth in this brief.

RATE OF RETURN

Appellants admit by their bill of complaint that their gross income for the year ending May 1st, 1914, under the old rates, was $26,507.15. They do not claim that this gross income would

be reduced by the new rates by a sum to exceed $10,000.00 in any one year. Assuming such to be a fact, deducting said $10,000.00 from the gross income, they would obtain a gross income, under the new rates, for the year ending May 1st, 1914, of $16, 507.15. The uncontradicted testimony of Mr. Sangster, as set forth in his affidavit, is that the operating expenses of the utility amounted to the sum of $8,920.00 per year. (See affidavit of Sangster.) Deduct this sum from the gross income derived under the new rates, i. e., $16,507.15, and we have left in net income, for the year ending May 1st, 1914, under the new rate fixed by the Commission, of $7,687.15, which net income covers a depreciation fund and a rate of return on the valuation of the property. This net income amounts to a rate of 10 per cent on $76,871.50 and over a 12 per cent rate of return on $60,000.00. Assuming, for the sake of argument, that an allowance should be made of the value of even $75.00 per acre on the 240 acres of land claimed by appellants for water shed purposes, this would amount to the sum of $18,000. Add this to the valuation allowed by the Commission of $40,105.00 and we have the valuation of the water utility, including an exorbitant valuation of the water shed, the sum of $58,105.00, or $1,895.00 less than $60,000.00, and yet, as we have heretofore shown, under the new rates, the net income for the year 1914, would amount to a rate of return of over 12 per cent on $60,000.00, or approximately a 9 per cent rate of return after allowing for a depreciation fund of 3 1-2 per cent.

An allowance of a depreciation fund of 3 1-2 per cent is extremely liberal in the case of a water utility. We have thus demonstrated that, even if appellants' contention for a value for the water shed be allowed to an extent, which we contend is clearly unreasonable, still the rates fixed by the order of the Commission will yield a 9 per cent rate of return over operating expenses and depreciation reserve. Can any court reasonably say that such a rate of return amounts to confiscation, when the legal rate of interest in Arizona is only 6 per cent? (See affidavit of G. P. Bullard.

As was said by the Supreme Court of the United States, in the case of *City of Knoxville vs. Knoxville Water Company*, 212 U. S., page 1 (53 L. Ed. 371), *reading page* 17:

> "It cannot be doubted that, in a clear case of confiscation, it is the right and duty of the court to annul the law. Thus, in Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 4 Inters Com. Rep. 560, 14 Sup. Ct. Rep. 1047, where the property was worth more than its capitalization, and, upon the admitted facts, the rates prescribed would not pay one-half the interest on the bonded debt; in Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. Rep. 198, where the rates prescribed would not even pay operating expenses; in Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418, where the rates prescribed left substantially nothing over operating expenses and cost of service; and in Ex parte Young, supra, where, on the aspect of the case which was before

the court, it was not disputed that the rates prescribed were in fact confiscatory, injunctions were severally sustained. But the case before us is not a case of this kind. Upon any aspect of the evidence, the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event, would be substantially 6 per cent, or 4 per cent after an allowance of 2 per cent for depreciation. See Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241. We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation.

Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculation as to its effects, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt."

As we shall argue later in this brief, the presumption is that a reduction in the rates will result in a still greater income to appellants because of the increased consumption of water, than would result from the same business for the year ending May 1st, 1914, under the old rates.

It is not the province of a court to make rates. The court cannot disturb the determination of

the Corporation Commission, as to the reasonableness of the rate fixed by them, unless it can at the same time, say that the rate of return afforded under the rates fixed by the Commission is so low as to practically result in confiscation. There was no such showing on the part of appellants in this case.

"Unreasonable," as used by courts in passing on reasonableness of rates fixed by legislative authority means confiscation.

San Diego Land & Town Co. v. National City, 174 *U. S.* 739, 43 *L. Ed.* 1154, 19 *Sup. Ct. Rep.* 804; *Spring Valley Waterworks v. San Francisco*, 82 *Cal.* 286, 6 *L. R. A.* 756, 16 *Am. St. Rep.* 116, 22 *Pac.* 910, 1046; *Knoxville v. Knoxville Water Co.*, 212 *U. S.* 1, 53 *L. Ed.* 371, 29 *Sup. Ct. Rep.* 148; *Willcox v. Consolidated Gas Co.*, 212 *U. S.* 19, 53 *L. Ed.* 382, 29 *Sup. Ct. Rep.* 192, 15 *Ann. Cas.* 1034; *Noyes, Am. R. rates p.* 250.

The only inquiry open to the courts is whether the order was regularly made and duly served, and whether any constitutional rights have been violated. In other words, Are the rates fixed confiscatory? Has the Commission, under the guise of regulation, acted so arbitrarily as to abuse its discretion, or otherwise acted beyond the scope of its authority? The power, and not the mere expediency of its exercise, is the question. Upon the reasonableness and justice of a rate it may be said the determinations of facts by the Commission are conclusive.

Interstate Commerce Commission v. Illinois C. R. Co., 215 *U. S.* 452, 54 *L. Ed.* 280, 30 *Sup. Ct. Rep.* 155; *Baltimore & O. R. Co. v. United States*, 215 *U. S.* 481, 54 *L. Ed.* 292; 30 *Sup. Ct. Rep.* 164; *Southern P. Co. v. Interstate Commerce Commission*, 219 *U. S.* 433, 55 *L. Ed.* 283, 31 *Sup. Ct. Rep.* 288; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 *U. S.* 235, 55 *L. Ed.* 448, 31 *Sup. Rep.* 392; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.*, 218 *U. S.* 88, 110, 54 *L. Ed.* 946, 957, 30 *Sup. Ct. Rep.* 651; *Monongahela Bridge Co. v. United States*, 216 *U. S.* 177, 54 *L. Ed.* 435, 30 *Sup Ct. Rep.* 356.

POINTS OF LAW TO BE CONSIDERED BY THE COURT IN DETERMINING AS TO WHETHER AN INTERLOCUTORY INJUNCTION SHOULD OR NOT HAVE BEEN GRANTED HEREIN.

"A state may require of a public utility a certain service to be performed at a rate, which, though affording a large margin over expense of operation, does not pay its full share toward profit on capital, and may even require certain services to be rendered at a loss, provided the utility is left, on the whole, with a fair profit." *Ruggles vs. Illinois*, 108 *U. S.* 526, 538, 27 *L. Ed.* 812, 817, 2 *Sup. Ct. Rep.* 832; *St. Louis & S. S. R. R. Co. vs. Gill*, 156 *U. S.* 649, 665, 666, 39 *L. Ed.* 567, 573, 15 *Sup. Ct. Rep.* 484; *Smyth vs. Ames*, 169 *U. S.* 466, 541, 42 *L. Ed.* 819, 847,

18 *Sup. Ct. Rep.* 418; *San Diego Land & Town Co. vs. National City*, 174 *U. S.* 739, 760, 43 *L. Ed.* 1154, 1162, 19 *Sup. Ct. Rep.* 804; *Minneapolis & St. L. R. Co. vs. Minnesota*, 186 *U. S.* 257, 46 *L. Ed.* 1151, 22 *Sup. Ct. Rep.* 900; *Atlantic Coast Line R. Co. vs. North Carolina Corp. Commission*, 206 *U. S.* 1, 51 *L. Ed.* 993, 27 *Sup. Ct. Rep.* 585, 11 *A. & E. Ann. Cas.* 398.

The presumption is that the rates fixed by the Commission are reasonable, and the valuation fixed by them is correct.

Minneapolis & St. L. R. Co. vs. Minnesota, 186 *U. S.* 257-264, 46 *L. Ed.* 1151-1156, 22 *Sup. Ct. Rep.* 900; *Dow vs. Beidleman*, 125 *U. S.* 680, 31 *L. Ed.* 841, 2 *Inter. Com. Rep.* 56, 8 *Sup. Ct. Rep.* 1028; *Chicago, M. & S. P. R. Co. vs. Tompkins*, 176 *U. S.* 167, 172, 173, 44 *L. Ed.* 417, 420, 20 *Sup. Ct. Rep.* 336; *San Diego Land & Town Co. vs. National City*, 174 *U. S.* 753, 755, 43 *L. Ed.* 1159, 1160, 19 *Sup. Ct. Rep.* 804.

Unless this presumption is overcome by the clearest and most convincing testimony, the application for an interlocutory injunction was properly denied. *Knoxville vs. Knoxville Water Co.* 212 *U. S.* 1, *text pages* 8, 16, 17. As was said by the court in this case on page 16:

> "The jurisdiction which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into the court with the claim that the ordinance is unconstitutional, it must be prepared

to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect, as to violate the Constitution of the United States." And again on the same page: "Judicial interference should never occur unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under a guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use."

See also *San Diego Land & Town Co. vs. National City*, 174 *U. S.* 739, 754, 43 *L. Ed.* 1154.

> "In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say *that it was impossible for a fair minded board to come to the result which was reached.*" *San Diego Land & Town Co. vs. Jasper*, 189 *U. S.* 439, 47 *L. Ed.* 892.

The burden of proof is on appellants, and is so strong that it must show that the state authorities could not fair mindedly have come to the result which was reached.

United States vs. Gettysburg Electric R. Co., 160 *U. S.* 668, 680, 40 *L. Ed.* 576, 580 16 *Sup. Ct. Rep.* 427; *Sweet vs. Rechel*, 159 *U. S.* 380, 40 *L. Ed.* 188, 16 *Sup. Ct. Rep.* 43; *Talbot vs. Hudson*, 16 *Gray* 417; *Re Wellington*, 16 *Pick.* 96, 26 *Am. Dec.* 631; *Illinois C. R. Co. vs. Interstate Commerce Commission*, 206 *U. S.* 441, 445, 51 *L. Ed.* 1128, 1133, 27 *Sup. Ct. Rep.* 700; *San Diego*

Land & Town Co. vs. National City, 174 *U. S.* 739, 754, 43 *L. Ed.* 1154, 1160, 19 *Sup. Ct. Rep.* 804; *Chicago M. & St. P. R. Co. vs. Tompkins*, 176 *U. S.* 167, 173, 44 *L. Ed.* 417, 420, 20 *Sup. Ct. Rep.* 336; *San Diego Land & Town Co. vs. Jasper*, 189 *U. S.* 439, 441, 442, 47 *L. Ed.* 892, 894, 895, 23 *Sup. Ct. Rep.* 571.

The principles of law above quoted are peculiarly applicable when the rates fixed by the Commission have not been tried, and the result of their establishment ascertained.

As was said by the Supreme Court of the United States in the case of *Wilcox Consolidated Gas Co.*, 212 *U. S.*, *page* 19, (53 *L. Ed. page* 382), *text pages* 41 *and* 42:

> "The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates. In this case, the rates have not been enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement before they came into actual operation:"

And again by the same court, text page 42 of the decision:

> "But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation *as based upon the value of the property found by the Court below*, and the dividends upon opinions as to value which differ considerably among the witnesses, and

> also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction *before a fair trial has been made of continuing the business under that rate and thus eliminating as far as is possible the doubt arising from opinions as opposed to facts.*"

The probabilities are, that if the reduced rates fixed by the Commission were given an actual trial, the result would be increased earnings. See *Wilcox vs. Consolidated Gas Co., supra.* Also from the same opinion of the court in said *Wilcox vs. Consolidated Gas Co., supra,* we find the following, *text page 51 of the decision:*

> "In this case, a slight reduction in the estimated value of the real estate plants and mains would give a 6 per cent return upon the total value of the property above stated, and again, increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished * * *." "But it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary, may increase it. The question of how much an increased consumption under a less rate will increase the earnings of complainants, if at all, at a cost not proportionate to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence, so uncertain,

> and where the margin between possible confiscation and valid regulation is so narrow, we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient."

This is true of all gas, electric or water companies. See *R. R. Commission vs. Cumberland Telephone & Telegraph Co.*, 212 *U. S.* 414, *text page* 426, 53 *L. Ed.* 517; *Chicago & G. T. R. Co. vs. Willman*, 143 *U. S.* 339, 36 *L. Ed.* 176. This doctrine is especially applicable in the case at bar.

An examination of the decisions rendered in the Federal courts, original and appellate, will show that they rarely exercise their power and jurisdiction to interfere with rates for public utility companies fixed by a legislative body.

The following are the only cases which have come under our observation:

Reagon vs. Farmers' Loan & T. Co., 154 *U. S.* 362, 38 *L. Ed.* 1014, 4 *Inters. Com. Rep.* 560, 14 *Sup. Ct. Rep.* 1047; *Covington & L. Turnp. Road Co. vs. Sanford*, 164 *U. S.* 578, 41 *L. Ed.* 560, 17 *Sup. Ct. Rep.* 198; *Smyth vs. Ames*, 169 *U. S.* 466, 42 *L. Ed.* 819, 18 *Sup. Ct. Rep.* 418.

On the other hand, said courts in the following cases have refused to interfere with the rates fixed by such legislative bodies for public utilities:

San Diego Land & Town Co. vs. National City, 174 *U. S.* 739, 43 *L. Ed.* 1154, 19 *Sup. Ct. Rep.* 804; *Chicago & G. T. R. R. Co. vs. Wellman*, 143

U. S. 339, 36 *L. Ed.* 176, 12 *Sup. Ct. Rep.* 400; *Atty. Gen. vs. Chicago & N. W. R. Co.*, 35 *Wis.* 583; *Stanislaus County vs. San Joaquin & Silver Canal & Irrig. Co.*, 192 *U. S.* 201, 48 *L. Ed.* 406, 24 *Sup. Ct. Rep.* 241; *Dow vs. Beidleman*, 125 *U. S.* 680, 31 *L. Ed.* 841, 2 *Inters. Com. Rep.* 56, 8 *Sup. Ct. Rep.* 1028; *St. Louis & S. F. R. Co. vs. Gill*, 156 *U. S.* 649, 39 *L. Ed.* 567, 15 *Sup. Ct. Rep.* 484; *San Diego Land & Town Co. vs. Jasper*, 189 *U. S.* 439, 47 *L. Ed.* 892, 23 *Sup. Ct. Rep.* 571; *Minneapolis & St. L. R. Co. vs. Minnesota*, 186 *U. S.* 257, 46 *L. Ed.* 1151, 22 *Sup. Ct. Rep.* 900; *Atlantic Coast R. Co. vs. Florida*, 203 *U. S.* 256, 51 *L. Ed.* 174, 27 *Sup. Ct. Rep.* 108; *Seaboard Air Line R. Co., vs. Florida*, 203 *U. S.* 261, 51 *L. Ed.* 175, 27 *Sup. Ct. Rep.* 109; *Alabama & V. R. Co. vs. Mississippi R. Commission*, 203 *U. S.* 496, 51 *L. Ed.* 289, 27 *Sup. Ct. Rep.* 103.

See also *Knoxville vs. Knoxville Water Co., supra*; *Wilcox vs. Consolidated Gas Co., supra.*

They are reluctant to interfere with such rates, even when the same are fixed by statute or ordinance, where comparatively little investigation is had. How much more reluctant should they be in a case where the rate is fixed (as it was in this case) by a Commission after a lengthy and exhaustive investigation and hearing.

It is a significant fact that in the case of *ex parte Young*, 209 *U. S.* 123, 52 *L. Ed.* 714 *which* did not deal with a public utility, but with a carrier where one rate was fixed by statute and an-

other rate was fixed by a Commission, and both were assailed), while the District court granted an interlocutory injunction as to the rate fixed by statute, it refused to do so as to the rate fixed by the Commission.

We contend that in this case, instead of applying to the District court, the appellants should have apealed from the decision of the Corporation Commission to the State courts under the rule laid down in *Prentis vs. Atlantic Coast Line R. Co.*, 211 *U. S.* 210, 53 *L. Ed.* 150.

Appellants' reply to this contention that the operation of the order of the Commission could not be stayed in the State courts, and that in case of such appeal they would have been forced to put in operation the rate fixed by the Commission. For the sake of argument, conceding this to be true, such a course of procedure would have been equitable, and is the identical one approved in particular by the Supreme Court of the United States in the cases hereinbefore cited, where they declare that the rate should be put in operation and tested before a court interferes.

> "The power to enjoin being discretionary, the court has the right to place any proper condition upon its exercise. What condition can be more proper than to say to the complainant: 'It is discretionary with us to remit you to the state tribunal. It is discretionary with us to remit you to a trial at law. As a condition of coming into equity and having your case tried by the Federal

procedure, you must do equity by charging no higher sum than is found by that procedure to be constitutional."

1 *Pom Eq. Jur. Pars.* 385, 386, 389-393; *De Walsh vs. Braman*, 160 *Ill.* 415, 43 *N. E.* 597; *Veazie vs. Williams*, 8 *How.* 134, 161, 12 *L. Ed.* 1018, 1029; *Willard vs. Tayloe*, 8 *Wall.* 557, 567, 569, 19 *L. Ed.* 501, 504; *People's National Bank vs. Marye*, 191 *U. S.* 272, 281, 285, 48 *L. Ed.* 180, 185, 187, 24 *Sup. Ct. Rep.* 68; *Parmley vs. St. Louis, I. M. & S. R. Co.*, 3 *Dill.* 34, *Fed. Cas. No.* 10,768; *Farmers' Loan & T. Co. vs. Denver L. & G. R. Co., C. C. A.* 588, 126 *Fed.* 46; *Thomas vs. Evans*, 105 *N. Y.* 615, 12 *N. E.* 571; *Fanning vs. Dunham*, 5 *Johns. Ch.* 142; *Stanley vs. Gadsby*, 10 *Pet.* 521, 9 *L. Ed.* 518; *Tiffany vs. Boatman's Sav. Inst.*, 18 *Wall.* 375, 385, 21 *L. Ed.* 868, 870; *Knoth vs. Manhattan R. Co.*, 109 *App. Div.* 807 96 *N. Y. Supp.*, 844, *affirmed in* 187 *N. Y.* 243, 79 *N. E.* 1015.

Rates will not be interfered with by courts if there is room for difference of intelligent opinions as to their reasonableness, and they will, in such case, be left to the test of actual experiment.

Pensacola & A. R. Co. vs. State, 25 *Fla.* 310, 3 *L. R. A.* 661, 2 *Interc. Com. Rep.* 522, 5 *So.* 833; *Chicago, B. & Q. R. Co. vs. Dey*, 38 *Fed.* 657; *Tilley vs. Savannah, F. & W. R. Co.*, 4 *Woods* 427, 5 *Fed.* 662.

RATES WILL NOT BE INTERFERED WITH BY COURTS IF THERE IS ROOM FOR DIFFERENCE OF INTELLIGENT OPINION AS TO THEIR REASONABLENESS AND THEY WILL, IN SUCH CASE BE LEFT TO THE TEST OF ACTUAL EXPERIMENT,

It may be claimed that the rule announced in the case of *Knoxville vs. Knoxville Water Company* and in the case of *Wilcox vs. Consolidated Gas Company*, and the cases hereinbefore cited, is not applicable in the determination of an application for a temporary injunction. The same line of reasoning applies in determining the question as to whether or not a temporary injunction should be granted as does in determining whether a permanent injunction should be granted. In the case of *Pensacola & A. R. Co. vs. State*, 25 *Fla.* 310, 3 *L. R. A.* 661, the court refused to grant a preliminary injunction for the reason that the mind of the court, from the conflicting testimony submitted on the application therefor, was left in doubt and it was determined that the rates should first be tested before a preliminary injunction should issue.

In the case of *Tilley vs. Savannah F. & W. R. Co.*, 5th *Federal* 662, text page, the decision of the court was on an application for an injunction *pendente lite*:

> "The officers of the railroad company declare that the rates fixed by the commission will so reduce its income that it will not

> suffiice to pay the running expense of the road and the interest on its bonded debt, leaving nothing for dividends to its stockholders. The railroad commissioners assert that their schedule was framed to produce 8 per cent income on the value of the road after paying cost of maintenance and running expenses. Which view is the correct one, it is impossible to decide from the evidence submitted. There is, however, a conclusive way, and it seems to me it is the only one, by which this controversy can be settled, and that is by experiment. A reduction of railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers or the railroad commission—in their view of the effect of the commission's tariff of rates, by allowing the tariff to go into operation. If it turns out that the views of the railroad company are correct, and that the schedule fixed by the commission is too low to afford a fair return upon the value of the road, the remedy is plain: for the law makes it the duty of the commissioners 'from time to time, and as often as circumstances may require, to change and revise said schedules.'"

The attention of the Court is also called to the following case: *Railroad Commission of Alabama vs. Central of Georgia Railway Company*, 170 *Fed., page* 225. This was a case on appeal to the Circuit Court of the Fifth District from the order granting an interlocutory injunction. The Circuit Court held that an interlocutory injunction had been improperly granted by

the District Court and announced the doctrine to be that where the evidence was conflicting and the case was not a clear one that an interlocutory injunction should be refused and that this was especially true where it was sought to enjoin the operation of a rate which had not yet gone into effect, where it was probable that a practical test of the rate would be required to ascertain the truth of the conflicting claims of the respective parties and that in such a case where there was a conflict of testimony that the injunction should not be granted on *ex parte* affidavits alone merely stating opinions. The Court, through Judge Shelby, said:

> "Where it is doubtful what, upon the final hearing may be ascertained to be the real facts of the case, and where the rights of the complainants are such that they will suffer no more injury if they finally succeed than would be inflicted on the defendants if unjustly enjoined, it is often the duty of the court to refuse a preliminary injunction. Especially is this true in a case where it is sought to enjoin the operation of a law fixing rates alleged to be confiscatory, when it is probable that a practical test of the law will be required to ascertain the truth. To adopt a different rule, the defendants might be unnecessarily and improperly restrained from doing what they have a right to do, and, such restraint suffer an injury for which they could obtain no adequate compensation." * * *

> "It is argued that the injunction should be issued because the rights of the defend-

ants and all interested are secured by bonds. It is true that the courts have held that the fact that the defendants' rights may be secured by bond is sometimes a sound reason, in cases where the final result is doubtful, for exercising judicial discretion in favor of granting the preliminary injunction. But that rule is not always controlling, and clearly it should not be applied in cases where the bond does not afford adequate protection. Here the bonds given are intended to secure innumerable passengers and shippers or consignees. It is not at all probable that the claims of one-tenth of them, on breach of bonds, would ever be presented, or, if presented, would be paid, and to enforce payment in the courts, unless those injured combined in their efforts, would cost more than the claim is worth. Those familiar with the Tift case know that the bond proved ineffectual as complete indemnity in that case, although the parties sought to be protected were large shippers of lumber. Tift, et al, v. Southern Railway Company, et al (C. C.) 123 Fed. 798; Id., 10 Interst. Com. Rep. 548; Id., (C. C.) 138 Fed. 753; Southern Ry. Co., et al v. Tift, et al), (C. C. A.) 148 Fed. 1021; Id. 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124; Tift, et al, v. Southern Ry. Co. et al, (C. C.) 150 Fed. 555. Where the injunction is granted, the bonds should, of course, be required, but the court cannot safely exercise its discretion upon the theory that the bond in a case like this gives complete indemnity."

We consider this case determinative on the question, in view of the peculiar and particular

facts surrounding the case at bar, and the great conflict of evidence.

The Commission has the power, if these rates are not compensatory, to make a subsequent order modifying their present order raising the rates to such an extent that the appellants may recoup whatever loss that they might incur pending an actual trial of the rates, and neither the appellants nor the court should assume that the Corporation Commission would not do its duty in this respect.

Appellants complain of various statutes of Arizona prescribing penalties for the violation of any order of the Commission. These statutes are not unconstitutional and do not fall within the rule laid down in the case of *ex parte Young, supra.*

In the case of *ex parte Young, supra*, the Supreme Court held that a certain statute fixing transportation rates for carriers within the state was unconstitutional, because of the severe penalties provided by the statute for non-compliance with the same, but a close analysis of this case will demonstrate that the Supreme Court based its ruling in this respect upon the fact that the penalties were attached before the corporation had any opportunity for a hearing by which the justice or injustice of the rates prescribed by the statute might be determined, and a further analysis will point out this significant fact; that while the Court granted an interlocutory injunction enjoining the enforcement of the rate fixed by the

statute, they refused to grant an interlocutory injunction enjoining the rate fixed by the Commission of that State.

After the hearing and determination of a case upon the merits a state commission has a right to enforce its orders by punishment for contempt or other adequate penal remedies. Otherwise no commission could enforce its orders. The statutes complained of are constitutional. The point, however, is of no importance in this case, for the reason that the order of the Commission is an entirely distinct question and not dependent upon the penalties fixed by the statutes.

Wilcox vs. Consolidated Gas Co., 212 *U. S.* 10, *text page* 54, 53 *L. Ed.* 300.

So. Pac. Co. vs. Campbell, 57 *L. Ed.* 1610, 230 *U. S.* 537; *also Western Union Tel. Co. vs. Richmond*, 224 *U. S.* 160 (56 *L. Ed.* 710).

To argue that if the order of the Commission was and is a valid exercise of the police power of the State, and that its enforcement might be enjoined, because the penalties prescribed by a separate statute for its non-enforcement are severe, would be to argue an absurdity.

The sole question for the Court to determine is, whether or not the order of the Commission is so unreasonable and arbitrary as to be utterly void. Unless it can say that this fact clearly appears beyond any question of doubt, the order of the Commission is a valid exercise of the police

power of the State, and should be carried out and enforced, no matter what the penalties may be for its non-enforcement.

Because of the reasons heretofore given, and the authorities heretofore cited in this Brief, we respectfully contend that the decree below, in so far as it denied the injunction restraining the appellees from enforcing the orders of the Corporation Commission should be affirmed, and that the injunction prayed for by appellants to restrain the Corporation Commission from enforcing penalties against appellants should have been denied by the Court below.

Respectfully submitted,

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